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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a federal agency, et al.

Defendants.

NO. 4:19-cv-05210-RMP

PLAINTIFF STATES' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

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Rules

Statutes

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I. INTRODUCTION

In August 2019 the Department of Homeland Security (DHS or Defendants) issued a new rule radically redefining "public charge." *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule massively expands the number of immigrants excludable as public charges by redefining the term to cover any immigrants, including children, likely to receive even a small amount of public benefits on a temporary basis. Defendants' motion to dismiss seeks a third bite at the apple, proffering arguments that this Court has already twice rejected. While Defendants assert a new challenge to the Plaintiff States' Equal Protection allegations (Count IV), this Court should conclude those allegations easily survive Defendants' motion, as Judge Feinerman recently did in related litigation. *See Cook Cty., Illinois v. Wolf*, No. 19-6334, 2020 WL 2542155, at *5-8 (N.D. Ill. May 19, 2020). As Defendants offer virtually no new substantive arguments, and this Court has already evaluated and rejected Defendants' contentions under the more stringent standards governing entry of a preliminary injunction, Defendants' motion should be denied.

II. BACKGROUND

Relevant factual and legal background is set forth in this Court's order granting a preliminary injunction of the Rule. ECF No. 162 (Oct. 11, 2019).

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III. ARGUMENT

A. Standard of Review

A court may grant a Rule 12(b)(1) motion to dismiss only if "the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig*, 546 F.3d 981, 984-85 (9th Cir. 2008). A Rule 12(b)(6) motion to dismiss may be granted only if the complaint fails to state a cognizable legal theory or allege facts sufficient to support a cognizable legal theory. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011); *Shroyer v. New Cingular Wireless Servs. Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). For either type of motion, the Court "must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[G]eneral factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation omitted). If the plaintiff alleges "enough facts to state a claim to relief that is plausible on its face," the motion must be denied. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

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B. The Court Properly Twice Rejected the Majority of Defendants' Arguments and Should Not Reconsider These Rulings

This Court now has twice rejected the vast majority of Defendants' arguments. Like Judge Feinerman did in *Cook Cty.*, 2020 WL 2542155, at *1, this Court should decline to reconsider these rulings. On October 11, 2019, the Court issued a 59-page opinion in which it carefully considered and rejected the same arguments Defendants make now on standing, the meaning of the public charge provision, and the arbitrary and capricious nature of the Final Rule. ECF 162; *see also* ECF 191 at 5. Where Plaintiffs already have prevailed at the more rigorous preliminary injunction stage, so too should they prevail on a motion to dismiss. *See, e.g.*, *Eli Lilly & Co. v. Arla Foods Inc.*, No. 17-C-703, 2017 WL 2976697, at *2-3 (E.D. Wis. July 11, 2017) (denying defendant's motion to dismiss because the court already "concluded at the preliminary injunction stage that [plaintiff] has Article III standing and has successfully stated claims"); *see also Johnson v. Wickersham*, No. 13-13672, 2014 WL 4897387, at *3 (E.D. Mich. Sept. 11, 2014), *report and recommendation adopted,* No. 13-CV-13672, 2014 WL 4897433 (E.D. Mich. Sept. 30, 2014) ("[T]he evidentiary threshold for obtaining preliminary injunctive relief is much higher than that required to survive summary judgment, and certainly higher than the *Iqbal* standard of merely showing a 'plausible claim.'"); *cf*. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (collecting cases).

Defendants argue that the Ninth Circuit motions panel's order staying injunctions entered against the Final Rule requires a different outcome, but the stay was issued by a divided panel without oral argument, on an abbreviated timeline, with limited briefing, and without the benefit of a complete record. *See* ECF 229 at 6-7; ECF No. 219 at 4. It did not sway Judge Feinerman in denying Defendants' almost identical motion to dismiss, *Cook Cty.*, 2020 WL 2542155, and it should not sway this Court.[1] As the Ninth Circuit has stated, a motions panel's decision on a motion to stay an injunction "provides 'little guidance as to the appropriate disposition on the merits.'" *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1262 (9th Cir. 2020) (citation omitted). "[M]erits panels of this court frequently depart from published decisions issued by motions panels in the same case." *Id*. Further, the reasons for this "are particularly heightened" where—as here—"the motions panel considered whether to grant the government's request for a stay of the district court's preliminary injunction," because "there are important differences between a preliminary injunction and a stay pending review." *Id*. at 1264.

The motions panel's stay order does "not provide the sweeping justification for the relief that DHS seeks." ECF No. 229 at 6. DHS "may renew

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[1] Notably, the Seventh Circuit recently affirmed Judge Feinerman's initial grant of a preliminary injunction on the merits. *See Cook Cty., Illinois Wolf*, No. 19-3169, 2020 WL 3072046 (7th Cir. June 10, 2020).

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under Rule 12(c) any arguments on those issues once the [Court of Appeals] rules" on the merits of the injunction. *Cook Cty.*, 2020 WL 2542155, at *1. At this juncture, the stay order does not warrant dismissal of the Plaintiffs' claims.

C. The Court Should Not Reconsider Its Conclusion That Plaintiffs Have Article III and Prudential Standing

1. The Plaintiff States have suffered injuries traceable to the Final Rule that would be redressed by a favorable decision

As this Court exhaustively explained previously (ECF 162 at 13-26), the Plaintiff States have standing based on allegations the Rule would harm the States as their residents disenroll from public benefits programs. To establish standing, a plaintiff must show a "concrete and particularized" injury that is "fairly traceable to the challenged action of the defendant" and is "likely to be redressed by a favorable decision." *Lujan*, 504 U.S. at 590, 598 (1992). States have standing to challenge rulemaking that imposes financial costs on them. *Massachusetts v. E.P.A.*, 549 U.S. 497, 521-26 (2007); *California v. Azar*, 911 F.3d 558, 571-73 (9th Cir. 2018). At this preliminary stage of litigation, a court may rely on allegations in the complaint or other evidence submitted by plaintiffs. *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (per curiam).

The Plaintiff States submitted numerous declarations from state and local health officials supporting their allegations the Rule would result in significant costs and negative effects to States. *See* ECF No. 162 at 2 n.1, 13-23. DHS *conceded* many of the costs and negative effects of disenrollment by immigrants

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from state and federal benefits programs. *See* 84 Fed. Reg. at 41,300-01; *see also id.* at 41,469 ("State and local governments . . . would incur costs related to the changes"); 83 Fed. Reg. at 51,270 (Rule could lead to "[w]orse health outcomes," "[i]ncreased use of emergency rooms," and "[i]ncreased prevalence of communicable diseases").

Defendants again claim such harms cannot be attributed to the Rule. But Defendants fail to even cite—much less discuss—the Supreme Court's recent analysis of standing in *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019); *see* ECF 162 at 24. Rejecting the same argument Defendants make here, the Court held the plaintiffs established standing based on "the predictable effect of Government action on the decisions of third parties." *New York*, 139 S. Ct. 2551 at 2566. Given DHS's concessions here regarding the Rule's predictable harms, the divided motions panel in this case reached unanimity on just a single point—namely, that DHS's jurisdictional arguments were "unavailing" and "disingenuous." *City and Cty. of San Francisco v. U.S. Citizenship and Immigration Servs.*, 944 F.3d 773, 795 (9th Cir. 2019).

Defendants speculate that the significant costs borne by the Plaintiff States' healthcare systems will be offset by Plaintiffs spending less to fund Medicaid. But the Plaintiffs' complaint credibly alleges the contrary (as is borne out by the evidence previously credited by the Court). ECF No. 31, ¶¶ 227-231. The Rule will *increase* Plaintiffs' healthcare costs, as newly uninsured patients

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avoid preventative care, suffer worse health outcomes, and use more costly services like emergency medical care. *See* ECF 31, *id.*; ECF No. 162 at 22-23. The Court should not credit Defendants' rank speculation that the Plaintiff States' healthcare systems, which often treat all patients regardless of their financial resources, *see, e.g.*, ECF No. 31, ¶¶ 190-212, will somehow recoup these substantial losses.

The Plaintiff States' allegations, combined with their evidentiary showing and DHS's own admissions, amply establish, particularly at this early stage, a concrete and particularized injury that is fairly traceable to the challenged conduct and is likely to be redressed by a favorable decision.

2. The Plaintiff States are within the zone of interests

Defendants are equally unsuccessful in claiming Plaintiff States fall outside the applicable zone of interests. Defendants make the same arguments the Court previously rejected when it found "states were at the center of the zone of interest for use of the term 'public charge' from the beginning of the relevant statutory scheme." ECF 162 at 29; *see id.* at 28-30. They ignore that the requirement is "not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 and n.16 (1987). Agency action is "presumptively reviewable," and "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). A party will fail the zone-of-interests test only if its interests are "so

marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*

The standard is readily met here, where the initial purpose of the public charge exclusion was to protect state fiscs by preventing immigrants from becoming primarily dependent on state governments for subsistence. *See* Hidetaka Hirota, *Expelling the Poor* 185 (2017) (detailing state campaigns precipitating public charge exclusion). Further, the INA expressly recognizes states' authority to provide and administer public benefits programs. *See* 8 U.S.C. §§ 1183a(a), (b), (e)(2); *see also Texas v. U.S.*, 809 F.3d 134, 163 (5th Cir. 2015), *as revised* (Nov. 25, 2015) (states' role in administering public benefits programs puts them within INA's zone of interests). The Plaintiff States administer the very public-benefit programs that Defendants assert are at issue. *See, e.g.*, ECF No. 31, ¶¶ 190-207. Plaintiff States are thus well within the zone of interests, as the Rule imposes significant uncompensated costs on them and undermines the administration of their comprehensive public assistance programs.

D. Count I States a Valid Claim for Relief

The Plaintiff States have adequately pled the Rule is contrary to the INA. ECF No. 31, ¶¶ 415-418. In granting the preliminary injunction, this Court already held Plaintiffs are likely to prevail on Count I because Congress "unambiguously rejected key components of the [Rule]." ECF No. 162 at 44; *see*

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also id. at 34-48. The Plaintiff States thus already cleared a far higher bar than the *Twombly/Iqbal* "plausibility" standard for a motion to dismiss.

When considering whether a rule is consistent with controlling law under *Chevron*, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Courts use the "traditional tools of statutory construction" to determine whether "the intent of Congress is clear." *Chevron*, 467 U.S. at 842 and n.9; *Brown & Williamson*, 529 U.S. at 132. If the statute does not address the precise question after applying all of those tools, the court asks whether the Rule is a reasonable interpretation of the statute. Here, the Rule fails both tests.

1. Congress addressed the precise question presented

In the preliminary injunction order, the Court correctly determined Congress's intent based primarily on two factors: first, Congress had repeatedly authorized lawful immigrants to receive specific benefits the Rule would make a basis for exclusion; and second, Congress rejected the policy embodied in the Rule when it reenacted the "public charge" provision. ECF No. 162 at 35-41, 44. These conclusions compel the denial of DHS's motion to dismiss Count I.

To start, this Court correctly cited numerous statutes in which Congress expressly authorized lawful immigrants to receive the specific types of non-cash

benefits the Rule now makes a basis for exclusion. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. 104-193, 110 Stat. 2105 (1996) (codified as amended at 8 U.S.C. §§ 1601-46); 8 U.S.C. §§ 1612(a)(2)(L), 1613(a) (allowing lawful permanent residents to receive many forms of federal public benefits included in the Rule—including Medicaid and SNAP—beginning five years after entry); 8 U.S.C. §§ 1612(a)(2)(A) & (a)(2)(C), 8 U.S.C. § 1613(b)(1)-(2) (lawful immigrants eligible for other benefits covered by the Rule, including Section 8 housing vouchers); Agricultural Research, Education and Extension Act of 1998, Pub. L. No. 105-185, 112 Stat. 523 (restoring eligibility for certain elderly, disabled and child immigrants who resided in the United States when PRWORA was enacted); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (restoring eligibility for food stamps to qualified aliens). Plaintiffs plausibly allege, as this Court correctly determined (ECF No. 162 at 37-39), that these statutes expressed clear Congressional intent that an immigrant's receipt of these same benefits should not alone be a basis upon which DHS may refuse to extend a visa on public charge grounds.

In addition, the Court properly credited Plaintiffs' argument that Congress's repeated rejection of efforts to expand the public charge exclusion constituted additional evidence of its clear intent to reject the Rule. *See* ECF No. 162 at 38-39, 41. This conclusion is not only plausible but is consistent with

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established law. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 600–01 (1983); *see also Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 533 (2009); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987).

2. The statutory text is inconsistent with the Final Rule

DHS's definition of "public charge" cannot be reconciled with Congressional intent as reflected in the statutory text. The text of the original 1882 public charge exclusion provided that a "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge . . . shall not be permitted to land." Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214. A "public charge" was, as the text plainly stated, one who is "unable to take care of himself or herself," not one who temporarily receives a small amount of benefits. *See id.*

Indeed, in the 1882 statute that first established the "public charge" exclusion, Congress also authorized "support and relief" for "immigrants therein landing as may fall into distress or need public aid." Act to Regulate Immigration, ch. 376, § 2, 22 Stat. 214 (1882) (emphasis added). In the terminology of the time, an immigrant who "landed" was one who was permitted entry; by contrast, a person deemed a "public charge" was not "permitted to land." *Id.* Thus, Congress expressly contemplated that obtaining "support and relief" alone did not itself make an immigrant a "public charge."

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These plain statements of congressional intent are also consistent with the then-contemporaneous dictionary definitions. *See Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (undefined statutory term presumably has its "ordinary or natural meaning" from the "year [it] was enacted"). The period's most comprehensive American dictionary defined the root word "charge" to mean "[a]nything committed to another's custody, care, concern, or management." *See* The Century Dictionary of the English Language, Vol. IV at 929 (1889-91); *see also* Webster's Condensed Dictionary of the English Language 85 (3d ed. 1887) (defining "charge" as "[t]he person or thing committed to the care or management of another"). In contrast, DHS fails to cite even one contemporaneous dictionary definition supporting its interpretation.

3. The Final Rule contradicts a consistent line of judicial decisions

DHS failed at the preliminary injunction stage, and fails now, to cite *any* judicial decision holding that the public charge exclusion applies to noncitizens who received modest public benefits on a temporary basis. Early judicial decisions applying state "poor laws"—the predecessors to the federal ground for exclusion—make clear the common law understanding of "public charge" required more than mere temporary receipt of public benefits. *See City of Boston v. Capen*, 61 Mass. 116, 121-22 (1851); *In re O'Sullivan*, 31 F. 447, 449 (C.C.S.D.N.Y. 1887); *see also Davies v. State ex rel. Boyles*, 1905 WL 629 (Ohio

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Cir. Ct. July 8, 1905), 17 Ohio C.D. 593, 595-96 (July 8, 1905); *Yeatman v. King*, 2 N.D. 421, 51 N.W. 721, 723 (1892); *Twp. of Cicero v. Falconberry*, 14 Ind. App. 237, 42 N.E. 42, 44 (1895).

After Congress incorporated the concept of a "public charge" into the 1882 Act, federal decisions applying the public charge exclusion uniformly maintained the term's plain meaning—namely, that public charges were those individuals fundamentally unable to care for themselves and primarily reliant on public benefits for survival. *See Gegiow v. Uhl*, 239 U.S. 3, 10 (1915) (public charge exclusion applies only to immigrants with "permanent personal objections accompanying them"); *Howe v. U.S.*, 247 F. 292, 294 (2d Cir. 1917) (public charge category excludes only "persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future"); *Ex parte Mitchell*, 256 F. 229, 233 (N.D.N.Y. 1919); *U.S. v. Williams*, 175 F. 274, 275 (S.D.N.Y. 1910) (L. Hand, J.); *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) (citing *Gegiow*, 239 U.S. 3) (holding 25-year-old woman with some job skills and "disposition to work" not a public charge, despite limited English and temporary inability to support herself); *see also Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920) *aff'd in part, rev'd in part*, 259 U.S. 276 (1922) (citing *Howe*, 247 F. at 294). Congress's repeated reenactment of the "public charge" exclusion against the backdrop of this longstanding

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interpretation of the term further illustrates its rejection of the policy embodied in the Rule.

As Judge Feinerman explained in enjoining the Final Rule, "the Supreme Court told us just over a century ago what 'public charge' meant in the relevant era, and thus what it means today." *Cook Cty., Illinois v. McAleenan*, 417 F. Supp. 3d 1008, 1023 (N.D. Ill. 2019), *aff'd sub nom. Cook Cty., Illinois v. Wolf*, No. 19-3169, 2020 WL 3072046 (7th Cir. June 10, 2020)[2]. In particular, "*Gegiow* teaches that 'public charge' does not, as DHS maintains, encompass persons who receive benefits, whether modest or substantial, due to being temporarily unable to support themselves entirely on their own." *Id.* at 1023. Rather than adhere to the Supreme Court's interpretation of the unambiguous statute, however, the Ninth Circuit motions panel pointed to historical changes in how the government supports the needy and a perceived evolution in agency interpretations of "public charge" to conclude: "we are unable to discern one fixed understanding of 'public charge' that has endured since 1882." *City & Cty. of San Francisco*, 944 F.3d at 796. But this conclusion paid insufficient heed to *Gegiow*, which interpreted the

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[2] While the Seventh Circuit agreed there was language in *Gegiow* supporting the district court's reading, it interpreted the decision more narrowly, holding that the Final Rule failed at *Chevron* Step Two. 2020 WL 3072046, at *9-13. Plaintiff States respectfully urge that Judge Feinerman was correct in his interpretation of *Gegiow*.

statute to provide unambiguously that "'public charge' encompasses only persons who . . . would be substantially, if not entirely, dependent on government assistance on a long-term basis." *Cook Cty.*, 417 F. Supp. 3d at 1023; *see Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction . . . if the prior court decision holds that its construction follows from the unambiguous terms of the statute."); *Wis. Cent. Ltd. v. U.S.*, 138 S. Ct. 2067, 2074 (2018) ("every statute's meaning is fixed at the time of enactment," and although "new applications may arise in light of changes in the world," such changes do not allow an agency to rewrite the text).

4. The Final Rule is contradicted by uniform agency action

A consistent line of agency decisions and interpretations of the public charge exclusion also shows that mere temporary receipt of public benefits is insufficient to render someone a public charge. For example, in *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (BIA 1962), the Attorney General detailed the public charge exclusion's "extensive judicial interpretation," explaining the INA "requires more than a showing of a possibility that the alien will require public support." *See also Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974) ("The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge."); *Matter of Harutunian*, 14 I. & N. Dec. 583, 589 (B.I.A. 1974) (receipt of "essentially

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supplementary benefits, directed to the general welfare of the public as a whole" not a basis for exclusion); *Adjustment of Status for Certain Aliens*, 52 Fed. Reg. 16205, 16209 (May 1, 1987) (Medicaid and "assistance in kind, such as food stamps, public housing, or other non-cash benefits" *not* a basis for exclusion because they are not "designed to meet subsistence levels"); 64 Fed. Reg. 28,689, 28,692 (1999) (INS formal guidance confirming that it had "never been [agency] policy that *any* receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge" (emphasis in original)).

The motions panel's historical analysis, which found that Congress had *not* addressed the precise issues here, rested on its misinterpretation of a single agency decision in 1948, *Matter of B—*, 3 I. & N. Dec. 323 (BIA 1948). *See City and Cty. of San Francisco*, 944 F.3d at 795. The motions panel recognized that the 1882 Congress sided with the Plaintiff States on the precise question at issue here: "[t]he 1882 act did not consider an alien a 'public charge' if the alien received merely some form of public assistance." *Id.* at 793. It found that this position changed, however, with *Matter of B—*, which "articulated a new definition of 'public charge.'" *Id.* at 795. The motions panel failed to recognize, however, that *Matter of B—* applied to a different statutory section governing deportation of immigrants pursuant to 8 U.S.C. § 1227(a)(5). This framework does not apply to immigrants seeking entry or adjustment of status under 8 U.S.C.

ATTORNEY GENERAL OF WASHINGTON
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§ 1182(a)(4).[3] *See Matter of Harutunian*, 14 I. & N. Dec. at 583 ("The test set forth in *Matter of B*— . . . for determining deportability as a person who has become a public charge . . . , is inapplicable to a determination of excludability . . . as a person likely to become a public charge . . ."). [4] The motions

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[3] *Matter of B*— was decided under the 1917 Immigration Act, which had analogous provisions. *See* Act of Feb. 5, 1917, §§ 3, 19, 39 Stat. 876, 889.

[4] *See also Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676, 28,679 (May 26, 1999) (explaining the "significant respect" in which "a public charge determination for purposes of inadmissibility differs from the context of deportability"). The panel also misread *Matter of B*— in two other ways. First, contrary to the panel's view that *Matter of B*— "articulated a new definition of 'public charge,'" *City and Cty. of San Francisco*, 944 F.3d at 795, the BIA itself emphasized that the rule it set forth "is not new," *Matter of B*—, 31 I. & N. at 326, and cited cases and Solicitor of Labor opinions dating back to 1929 for that assertion. Second, the panel interpreted *Matter of B*— as holding that "[p]ermanent institutionalization would not be the sole measure of whether an alien was a public charge," and that the BIA "would also consider whether an alien received temporary services from the government." *City and Cty. of San Francisco*, 944 F.3d at 795. But the INS decision says nothing about whether "temporary" services, or any services other than long-term institutionalization, are sufficient to trigger a public charge finding. Nor was that

panel's erroneous reading of *Matter of B*— formed the linchpin of its historical analysis and should not guide this Court.

5. Congress ratified the historical understanding of public charge

Since its first enactment, Congress has readopted the public charge exclusion without substantive change seven times.[5] In doing so, Congress ratified the settled understanding that an immigrant must receive more than temporary, modest benefits to be deemed a "public charge." Under established rules of statutory construction, Congress is "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-

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issue presented, because the respondent in that case was a long-term resident of a state mental institution.

[5] *See Immigration Act of 1891*, ch. 551, 26 Stat. 1084, 1084; *Immigration Act of 1907*, ch. 1134, 34 Stat. 898, 899; amended by *Act of March 26, 1910*, ch. 128, § 1, 36 Stat. 263, 263 (1910); *Immigration Act of 1917*, ch. 29 § 3, 39 Stat. 874, 876; *Immigration and Nationality (McCarran-Walter) Act of 1952* (INA), Pub. L. No. 414, § 212(a), 66 Stat. 163, 183 (codified as amended at 8 U.S.C. § 1101, *et seq.*); *Immigration Act of 1990*, Pub. L. No. 101-649, § 601(a)(4), 104 Stat. 4978, 5072 (codified as amended at 8 U.S.C. § 1182); *Illegal Immigration Reform and Immigrant Responsibility Act*, Pub. L. No. 104-208, § 531(a), 110 Stat. 3009-546, 3009-674-75 (1996); *Violence Against Women Reauthorization Act of 2013*, Pub. L. No. 113-4, 127 Stat. 54 (2013).

enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

6. The two other INA provisions cited by DHS do not support the Final Rule

DHS argues that the Final Rule's attempt to transform American immigration policy is "permissible" based on two other provisions of the INA. DHS is incorrect that such ancillary provisions support fundamentally recasting immigration policy through the public charge exclusion. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

DHS's primary argument is that the government's right of recovery against sponsors for immigrants' means-tested benefits in PRWORA shows that "the mere possibility" that aliens could receive public benefits was sufficient to render them a public charge. ECF No. 223 at 18-19. In adopting the sponsorship requirements in section 1182(a)(4)(C), Congress chose not to change the public charge standard to include receipt of non-cash benefits. Congress instead affirmatively authorized lawful immigrants to receive certain means-tested benefits. And just one month after Congress adopted PRWORA, it rejected an effort to redefine "public charge" to include receipt of non-cash benefits.

DHS's argument is also overbroad. PRWORA required only a subset of applicants subject to the public charge exclusion to obtain affidavits of support. *See* 8 U.S.C. § 1182(a)(4)(C)-(D). If Congress had intended for sponsorship requirements to expand the public charge definition, it would have applied them to all applicants subject to the public charge test. It did not, though, because the sponsorship affidavits serve a different purpose: to provide a reimbursement mechanism for DHS *after admission*. 8 U.S.C. § 1183a(b). Nothing in this limited post-admission remedy suggests that Congress surreptitiously transformed American immigration policy by redefining "public charge" to include any applicant likely to receive non-cash benefits in the future.

DHS also wrongly cites INA provisions excluding from the public determination the past receipt of benefits by immigrants "battered or subjected to extreme cruelty." ECF No. 223 at 18 (citing 8 U.S.C. §§ 1182(s), 1641(c)). But these benefits include cash benefits that would have been considered in public charge determinations under the 1999 Field Guidance. *See* 8 U.S.C. § 1611(c). Congress's exception of such benefits from the public charge determination thus does not demonstrate that all non-cash benefits must be considered, and there is no inconsistency between these provisions and the 1999 Field Guidance.

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7. The Plaintiff States plausibly allege the Final Rule violates Section 504 of the Rehabilitation Act

The Plaintiff States also plausibly allege the Final Rule discriminates against immigrants with disabilities in violation of Section 504. ECF No. 31, ¶¶ 413, 417(f). Although some disabilities may render an individual more likely to become a public charge (*e.g.*, conditions requiring long-term institutionalization), the Rule will have a disparate impact on individuals with disabilities by double- and triple-counting their disabilities against them and significantly increasing the likelihood they will be deemed public charges because of their disabilities.

Under Section 504, executive agencies are prohibited from excluding, denying benefits to, or subjecting to discrimination any individual "solely by reason of her or his disability." 29 U.S.C. § 794(a). "Exclusion or discrimination [under Section 504] may take the form of disparate treatment, disparate impact, or failure to make a reasonable accommodation." *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016); *see also Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008). A party may show disparate impact under Section 504 even where a government policy is facially neutral, provided the policy has the effect of "denying meaningful access to public services." *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013).

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In reviewing the Rule's effects on individuals with disabilities, this Court previously noted that Medicaid frequently covers services and devices unavailable under private insurance, which are "essential" for millions of people living with disabilities. *See* ECF No. 162 at 46-47; *see also* 84 Fed. Reg. at 41,367 ("Medicaid is often the only program available to and appropriate for people with disabilities); ECF No. 35-1 at 222 (Comment by ACLU) ("receipt of Medicaid is inseparable from the status of being disabled."). The Rule's positive and negative factors impermissibly double- and triple-count not only an individual's disability, but also their receipt of Medicaid benefits that "enable [them] to work." ECF No. 162 at 46-47. DHS concedes the Rule might have a "potentially outsized impact . . . on individuals with disabilities." 84 Fed. Reg. at 41,368. These facts cannot be reconciled with the motions panel's assertion that aliens will not be denied entry by the Final Rule solely because of their disability. *City and Cty. of San Francisco*, 944 F.3d at 800.

The motions panel is also incorrect that the public charge statute is more "specific" than—and thus controls over—the Rehabilitation Act. *Id.* As between the two statutes, Section 504's narrow prohibition against disability-based discrimination is far more targeted than the INA's generalized direction to consider "health" as a factor in the public charge analysis. Section 504 contains express definitions for what does and does not constitute a disability. By contrast, even Defendants concede Congress left the meaning of "health" undefined.

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Further, the INA does not specifically address how to evaluate individuals with disabilities; Section 504, by contrast, directly addresses the treatment of individuals with disabilities. *See* 29 U.S.C. § 794(a); *see also Law v. Siegel*, 571 U.S. 415, 421 (2014) ("[A] statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere.").

8. The Final Rule Also Fails Under *Chevron* Step Two

Even if the Court were now to reverse course and hold that the statute is ambiguous, the Final Rule still would not be entitled to deference, as it is an unreasonable interpretation of the statute. Under *Chevron*'s step two, courts must determine whether "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. To do so, the court "determines whether the regulation harmonizes with the language, origins, and purpose of the statute," and unlike step one, it may consider, among other things, legislative history. *Bankers Life & Cas. Co. v. U.S.*, 142 F.3d 973, 983 (7th Cir. 1998).

For many of the same reasons highlighted in the *Chevron* step one analysis, the agency's interpretation cannot be considered a permissible construction of the statute. *Cf. Whitman*, 531 U.S. at 481 (holding a policy unlawful even though the statute was ambiguous, as "the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear"). Moreover, independent reasons exist to find that DHS's construction of "public charge" is unreasonable. Most notably, while the statute mandates that DHS "shall"

consider "at a minimum" five characteristics—age, health, family status, assets, and education/skills—to determine whether an individual is likely to become a public charge, 8 U.S.C. § 1182(a)(4)(A), (B), the Final Rule does not actually apply a totality-of-the-circumstances test (despite DHS's insistence otherwise). Instead, the Final Rule creates an impermissibly strict test: use of public benefits. In DHS's own words, the Final Rule "redefines the term 'public charge' to mean an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." *See* 84 Fed. Reg. at 41,295; *see also* Mot. at 4 (calling this "requirement" the "12/36 standard"). Put differently, "if a DHS officer believes that an individual is likely to have benefits for 12 months out of a 36-month period, the inquiry ends there, and the individual is automatically considered a public charge." *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 349 (S.D.N.Y. Oct. 11, 2019) ("[R]eceipt of such benefits is not one of the factors considered; it is the factor.").

E. Count II States a Valid Claim for Relief

Count II alleges that DHS exceeded its statutory authority when it applied its new public charge standard to applications to extend visas and changes of status, which by statute are not subject to 8 U.S.C. § 1184(a)(4). In its motion, DHS admits that Congress has not authorized it to apply the public charge standard to applications for visa extensions and changes of status, and that the

Final Rule nevertheless applies its new public charge formula to these applications. ECF No. 223 at 23.

To reconcile this contradiction, DHS argues that it is merely borrowing the public charge standard to set a condition for approval of these applications. ECF No. 223 at 23. But DHS is not free to "borrow" a legal standard Congress established for one statutory application and use it for a different statutory provision altogether. *See Comcast Corp. v. F.C.C.*, 600 F.3d 642, 655 (D.C. Cir. 2010) (rejecting use of Congressional statement of policy in one statutory provision as basis to interpret different statutory provision). DHS next argues that a public charge admissibility determination is distinguishable from this evaluation of extensions of visas or changes in status because it predicts noncitizens' use of benefits in the future rather than disqualifying them for past use. ECF No. 223 at 23. But DHS's distinction between backward- and forward-looking assessments disintegrates under scrutiny. Its public charge test *is* backward-looking; individuals' past use of public benefits is counted against them when immigration officers predict their future use of benefits. *See* 84 Fed. Reg. 41,503 (codified at 8 C.F.R. §§ 212.22(b)(4)(E), 8 C.F.R. § 212.22(c)(2)). An immigrant applying for a green card is subject to disqualification for past use of public benefits under the Final Rule, just as a nonimmigrant applying for a visa extension or change of status.

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DHS's claim that it is not applying the public charge inadmissibility test to nonimmigrants is implausible. Not only does this "new condition of approval" appear in the very regulation titled "Inadmissibility on Public Charge Grounds," but it bootstraps into change of status and extension of stay applications the central criterion of DHS's new public charge test (*i.e.*, the receipt of public benefits above the 12-month threshold). DHS fails to explain how expanding that core criterion beyond the public charge exclusion's statutory bounds comports with its authority under the INA.

F. Count III States a Valid Claim for Relief

Separate and apart from the Plaintiff States' *Chevron* claim, Plaintiffs have sufficiently alleged in Count III that the Rule is arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A). *See* ECF No. 31, ¶¶ 424-427. An agency action qualifies as arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). With this framework in mind, Plaintiffs' position is simple and adequately pleaded: in promulgating the Rule, Defendants failed to address, justify, or meaningfully evaluate the significant harms identified by commenters,

as well as harms identified in the text of the Final Rule itself. Am. Compl. ¶ 427. Specifically, DHS concedes that the Rule will cause members of mixed-status households, including U.S. citizens, to disenroll from or decide not to enroll in public benefits. 84 Fed. Reg. at 41,300, 41,485. Nevertheless, DHS declined to address the harms that it acknowledges will result from this chilling effect, stating:

> DHS believes that it would be unwarranted for U.S. citizens and aliens exempt from public charge inadmissibility to disenroll from a public benefit program or forego enrollment in response to this rule when such individuals are not subject to this rule. DHS will not alter this rule to account for such unwarranted choices.

Id. at 41,313.

But "[s]tating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loans Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). Indeed, the law requires agencies to "adequately analyze the . . . consequences" of its actions, *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017), and provide more than "conclusory statements" to prove it "consider[ed] [the relevant] priorities." *Getty*, 805 F.2d at 1057; *see also McDonnell Douglas Corp. v. U.S. Dep't of Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (courts will not defer to an agency's "conclusory or unsupported suppositions").

As shown below, DHS can point to no such analysis or substantive weighing of the costs and benefits. Instead, DHS states that any costs resulting

from disenrollment remain "unclear" or "unquantifiable." *See, e.g.*, 84 Fed. Reg. at 41,463–41,477 (explaining, for example, that while "DHS has provided an estimate of the number of individuals that may choose to disenroll . . . it is unclear how long such individuals would remain disenrolled"). But the concrete harms from the Rule were clearly identified in public comments, and it is not enough for DHS to say it could not measure them.

In light of these dire public health concerns, the Court already properly found the agency's responses to the comments internally inconsistent, conclusory, and outside DHS's expertise or statutory mandate. ECF No. 162 at 16-21, 49-50. The Court's earlier findings, and the comments cited below, demonstrate that Count III plausibly alleges a violation of 5 U.S.C. § 706(2)(A) and requires denial of Defendants' motion to dismiss Count III.

1. The Plaintiff States plausibly allege DHS failed to address the Rule's devastating effects on public health

DHS received—but largely ignored—compelling evidence of public health crises likely to result from the Rule's implementation. For example, commenters warned that by deterring eligible individuals from accessing Medicaid benefits, the Rule would result in decreased vaccination rates and corresponding increases in the transmission of deadly communicable diseases. *See* 84 Fed. Reg. 41,384. DHS received evidence showing "uninsured individuals are much less likely to be vaccinated," and "even a five percent reduction in

vaccine coverage could trigger a significant measles outbreak." *Id.* Similarly, numerous medical associations warned the Rule would have a "devastating impact" on public health, resulting in "[d]ecreased vaccinations and untreated communicable diseases" that would "place the American public at risk for outbreaks." ECF No. 35-1 at 207, No. 35-2 at 42 (Comments by Adult Vaccine Access Coalition and Center for Health and Human Rights at Harvard University).

DHS never made any serious attempt to measure the full magnitude of such potential harm before deciding to implement the Rule. Instead, DHS—an agency with no experience in health care policy—simply exempted receipt of Medicaid benefits for pregnant women and individuals under 21 and then moved forward with the Rule, uncertain of the full scope of harm it might inflict. 84 Fed. Reg. at 41,384 (speculating that such limited Medicaid exemptions "should address a substantial portion, though not all, of the vaccinations issue"); *see also Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1072 (9th Cir. 2018) (an agency "must explain why uncertainty justifies its conclusion, otherwise we might as well be deferring to a coin flip").

DHS's cursory responses reflect a fundamental disregard for the dire public health warnings the agency received from public comments. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public

comment."). Despite such risks, DHS justified the Rule based primarily on the agency's purported interest in promoting "self-sufficiency" among immigrants. Plaintiffs plausibly allege that DHS acted arbitrarily and capriciously in retreating to this justification to explain away nearly any public health harm, particularly where the agency made no meaningful effort to understand the potential scope of those harms. *See Am. Wild Horse Preservation*, 873 F.3d at 932; *McDonnell Douglas*, 375 F.3d at 1187.

2. The Plaintiff States plausibly allege DHS failed to address the Rule's devastating effects on vulnerable populations

DHS received numerous comments and compelling evidence showing the Rule's most severe and lasting harms would likely fall on vulnerable populations, including young children and U.S. citizen children. For example, many commenters warned DHS that "[n]ot having enough food, inadequate or unstable housing, and economic insecurity are all examples of adverse experiences that can lead to toxic stress in young children," "interfer[ing] with brain development" and causing "physical and mental health problems that last into adulthood."[6]

[6] *See, e.g.*, ECF No. 35-1 at 604 (Comment by Child Care Law Center) (warning of "profound negative outcomes for children during childhood and into adulthood"); ECF No. 35-2 at 278 (Comment by Robert Wood Johnson Foundation) (cautioning that "children can be expected to bear the

Commenters also explained that the lasting trauma of such childhood deprivation can lead to decades of negative outcomes, including chronic asthma, higher incidences of unplanned pregnancies, substance abuse, depression, and mental illness.[7] As one commenter explained, children would likely experience increased food insecurity and malnutrition, which are linked to diabetes, heart disease, kidney disease, hypertension, depression, birth defects, asthma, anxiety, and suicidal ideation. *See* ECF No. 35-1 at 271 (Comment by Association of State Public Health Nutritionists).

Commenters also questioned what reason DHS could possibly have for applying so rigid a public charge analysis to children in the first place, as they are too young to work and their use of public benefits in no way suggests they are likely to become a public charge in the future. 84 Fed. Reg. at 41,370. In fact, commenters cited research showing *just the opposite*—namely, that "use of these programs in childhood helps children complete their education and have higher incomes as adults, be healthy, have better educational opportunities, and become

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disproportionate impact" of the Rule, which "flag[s] poor families as a result of their poverty and the presence of children").

[7] *See, e.g.*, ECF No. 35-1 at 611 (Comment by Childhood Asthma Leadership Coalition) (warning of greater childhood homelessness, with nearly a quarter of homeless young children suffering from asthma, or "over twice the national average").

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more likely to be economically secure and contribute to their communities as adults." *Id.* Even DHS conceded many of the targeted benefits programs "aim to better future economic and health outcomes for minor recipients." 84 Fed. Reg. at 41,371. Nevertheless, DHS responded to such concerns merely by clarifying it would continue to count a child's receipt of SNAP and housing benefits as evidence suggesting the child was likely to become a public charge. *See* 84 Fed. Reg. at 41,365, 41,369-371. DHS conceded this could have negative health effects on children, but again reflexively justified any such harms as outweighed by the agency's purported interest in promoting "self-sufficiency." *Id.* at 41,365, 41,369-371.

DHS offered no rational justification for exempting Medicaid coverage but still counting food and housing benefits against children, and the agency made no effort to understand the full scope of harm its decision might inflict. *See* ECF No. 162 at 52; *see also Ctr. for Biological Diversity*, 900 F.3d at 1072 (9th Cir. 2018); *Am. Wild Horse Preservation*, 873 F.3d at 932. In light of this shallow reasoning, the Court should not, at this early stage, uphold a rule that would promote so absurd a goal as childhood self-sufficiency at so great a cost. Plaintiffs have more than sufficiently alleged that the Final Rule is arbitrary and capricious.

G. Count IV States a Valid Claim for Relief

Count IV also survives Defendants' motion to dismiss because the allegations in the Amended Complaint support the reasonable inference that the

Rule was motivated by an unlawful intent to discriminate on the basis of race, ethnicity, or national origin. As Judge Feinerman held, at this early stage in the litigation, nothing more is required. *See Cook Cty.*, 2020 WL 2542155, at *6 (denying DHS's motion to dismiss Equal Protection claim).

1. The factual allegations in the Amended Complaint support a reasonable inference of discriminatory purpose

To survive Defendants' motion to dismiss, Plaintiffs must plausibly allege that "an invidious discriminatory purpose was a motivating factor behind" the Rule. *Ave. 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504 (9th Cir. 2016). For a claim to be "plausible," Plaintiffs need only "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. In assessing whether Plaintiffs have met this standard, "all inferences must be drawn in [their] favor." *Ave. 6E Investments, LLC*, 818 F.3d at 509.

The factual allegations in the Amended Complaint—along with the reasonable inferences to which Plaintiffs are entitled—clear this bar. Plaintiffs' allegation that "[t]he Rule was motivated by Administration officials' intent to discriminate on the basis of race, ethnicity, or national origin," Am. Compl. ¶ 430, is supported by several factual bases cited in the Amended Complaint.

1. First, Plaintiffs quote remarks by Administration officials "reflecting animus toward non-European immigrants." *Id.* ¶ 432. White House

senior adviser Stephen Miller—an ardent supporter and key architect of the Rule—said he "would be happy if not a single refugee foot ever touched American soil." *Id.* ¶ 89. Similarly, when referring to immigrants from Haiti and Africa, the President asked why the United States should accept immigrants from "shithole countries" rather than from nations like "Norway." ECF No. 31 ¶ 92.

These allegations are supported by additional public-record evidence that has surfaced since this suit was filed, which Defendants do not dispute.[8] *See* ECF No. 198 at 8–9 & n.3. Recently released emails show that Miller was an avid reader of white supremacist and racist websites, and he recommended a novel titled "The Camp of Saints," which portrays non-white immigrants as rapists who invade Europe.[9] *See also Cook Cty.*, 2020 WL 2542155, at *6 (on motion to dismiss, plaintiff "is entitled to the . . . reasonable inference that Miller, having become the President's principal immigration advisor, would seek to advance his beliefs by pressing for a regulation that suppresses nonwhite immigration").

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[8] The Court may also take judicial notice of publicly available documents. *U.S. v. Raygoza-Garcia*, 902 F.3d 994, 1001 (9th Cir. 2018) ("A court may take judicial notice of undisputed matters of public record.").

[9] *See* Michael Edison Hayden, *Stephen Miller's Affinity for White Nationalism Revealed in Leaked Emails*, Southern Poverty Law Center (Nov. 12, 2019), https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails.

Defendant Kenneth Cuccinelli—the former Acting Director of DHS sub-agency U.S. Citizenship and Immigration Services (USCIS)—has also echoed rhetoric that supports an inference of discrimination. In response to questions about the Rule, Cuccinelli stated publicly that the Emma Lazarus sonnet inscribed on the Statue of Liberty inviting "your tired, your poor, your huddled masses" actually "refer[ed] back to people coming from Europe." ECF No. 31, ¶ 117; *see also Cook Cty.*, 2020 WL 2542155, at *6 (on motion to dismiss, plaintiff "is entitled to the reasonable inference that Cuccinelli's statements revealed . . . his understanding that the Rule was intended to favor white immigrants and disproportionately harm nonwhite immigrants"); *see also* ECF No. 31 at ¶ 90.

These statements by senior officials, who were central to the promulgation of the Rule, cannot be dismissed as irrelevant "stray comments." ECF No. 223 at 31. Significantly, Cuccinelli's statement expressing a clear preference for European immigrants was made in response to questions about the Rule itself. ECF No. 31, ¶¶ 116–17. Nor is Cuccinelli "non-DHS personnel" as Defendants suggest (ECF No. 223 at 34)—as the Acting Director of USCIS at the time the Rule was finalized, Cuccinelli was a key decision maker. ECF No. 31, ¶ 116.

2. Plaintiffs further allege that the "historical background" of the Rule and the "specific sequence of events leading up to" its announcement support an inference of discrimination. ECF No. 31, ¶ 432. Seeking to influence DHS's usual process, Miller pressured the agency to publish the Rule more quickly,

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calling the agency's "timeline" for the Rule "unacceptable" and "an embarrassment." *Id.* ¶ 96; *see also id* ¶ 112 (Miller reportedly shouted: "You ought to be working on this regulation all day every day"). Miller even urged the President to remove L. Francis Cissna—then-Director of USCIS—because DHS did not act with enough urgency in finalizing the Rule. *Id.*, ¶ 113.

3. Finally, Plaintiffs cite the "anticipated disparate racial and ethnic impact" of the Rule. ECF No. 31, ¶¶ 431–32. Specifically, "the Rule will cause Latinos and other people of color to be disproportionately excluded from the United States." *Id.* ¶ 431. According to one estimate, the arbitrary income threshold in the Rule "would have disproportionate effects based on national origin and ethnicity, blocking 71% of applicants from Mexico and Central America, 69% from Africa, and 52% from Asia—compared to only 36% from Europe, Canada, and Oceania." *Id.* ¶ 407; *see also id.* ¶¶ 408–10 (describing how other factors, such as credit scores and high school degree, would also have a disparate impact). DHS was aware that the Rule would have these effects, as "[n]umerous commenters pointed to the racially and ethnically disparate impact" of the agency's new public charge definition. *Id.* ¶ 153.

In response to these concerns, DHS itself acknowledged the possibility that the Rule would disfavor certain groups, explaining that including certain benefits in the public charge assessment "may impact in greater numbers communities of color, including Latinos and [Asian American and Pacific Islanders], . . . and

therefore may impact the overall composition of immigration with respect to these groups." 84 Fed. Reg. at 41,369. The racial and ethnic animus evident in statements by top officials, *see supra* at 33-35, suggests the Rule was adopted "because of, and not in spite of," this disparate impact. ECF No. 31, ¶ 411.

Taken together, and construed in the light most favorable to Plaintiffs, these allegations "nudge[]" Plaintiffs' Equal Protection claim—including the requisite discriminatory intent—"across the line from conceivable to plausible." *Ashcroft*, 556 U.S. at 680. As Judge Feinerman concluded, Plaintiffs "expressly and plausibly allege[] that DHS issued the Rule knowing and intending that it would have a disproportionate negative impact on nonwhite immigrants." *Cook Cty.,* 2020 WL 2542155, at *6; *see also id.* at *12.

2. Defendants misconstrue the governing standard

In urging dismissal, Defendants' arguments ignore the legal framework that governs claims of discrimination.

1. That a policy may be "facially neutral," ECF No. 223 at 31, does not defeat a claim that the policy was motivated by unlawful animus. The Supreme Court long ago rejected the argument that there can be no discriminatory purpose where a policy "appears neutral on its face." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Instead, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry" into both "circumstantial and direct evidence of intent." *Id.*

Although disparate impact, standing alone, cannot support an Equal Protection claim, it is circumstantial evidence that supports a reasonable inference of discriminatory intent. *See Arlington Heights*, 429 U.S. at 266 (explaining that "[t]he impact of the [challenged] action" may be "an important starting point" in evaluating "discriminatory purpose"). Animus may also be inferred from the other information Plaintiffs have alleged in addition to disparate impact, including: (1) "[t]he historical background of the decision," (2) "[t]he specific sequence of events leading up to the challenged decision," (3) "[d]epartures from the normal procedural sequence," and (4) "statements by members of the decisionmaking body." *Id.* at 266–68; *see supra* at 33-35.

Nor can Defendants defeat Plaintiffs' Equal Protection claim by pointing to purported "non-discriminatory justifications" or the "notice-and-comment process" DHS used to promulgate the Rule. ECF No. 223 at 33. Again, the Supreme Court has made clear that a plaintiff alleging an Equal Protection violation is *not* "require[d] to prove that "the challenged action rested solely on . . . discriminatory purposes." *Arlington Heights*, 429 U.S. at 265. "[G]overnment action may violate equal protection" so long as "a discriminatory purpose was *one* motivating factor." *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1124 (N.D. Cal. 2018) (emphasis added); *see also Cook Cty.*, 2020 WL 2542155, at *7.

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2. Defendants likewise misread the Supreme Court's decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). According to Defendants, *Hawaii* stands for the proposition that any time a case "implicates" the Executive Branch's "immigration policies," courts must always apply a "highly deferential standard" instead of strict scrutiny. ECF No. 223 at 32. But the Supreme Court said no such thing. Instead, "the Court in *Hawaii* held that the sphere in which executive power is shielded from searching inquiry is the President's adoption of a preventive measure in the context of international affairs and national security, not the *entire* realm of immigration law." *Cook Cty.*, 2020 WL 2542155, at *7 (citing *Hawaii*, 138 S. Ct. at 2409) (alterations omitted). *Hawaii* does not apply here, though, because of important distinctions between the two cases.

First, the statute at issue in *Hawaii* (8 U.S.C. § 1182(f)) "exudes deference to the President in every clause." 138 S. Ct. at 2408. By contrast, the statute at issue here (8 U.S.C. § 1182(a)(4)) does not grant the President expansive discretion, nor does it commit the decision to exclude an alien "to unguided agency discretion." *Cook Cty.*, 2020 WL 2542155, at *6 (citing *Abourezk v. Reagan*, 785 F.2d 1043, 1051 (D.C. Cir. 1986) *aff'd*, 484 U.S. 1 (1987)).

Second, the "international affairs and national security" concerns in *Hawaii* are not present here. 138 S. Ct. at 2409. DHS has consistently offered only economic justifications for the Rule. S*ee* 84 Fed. Reg. at 41,295 ("DHS is revising its interpretation of 'public charge' . . . to better ensure that aliens subject

to the public charge inadmissibility ground are self-sufficient."); *see also* ECF No. 233 at 33 (Rule "facilitate[s] self-sufficiency among immigrants").

Finally, the plaintiffs in *Hawaii* challenged an executive decision regarding "the entry of foreign nationals" into the United States, 138 S. Ct. at 2420 n.5, but the Rule at issue here applies to individuals who are "lawfully present." ECF No. 31, ¶15. "[E]qual protection claims do not necessarily receive rational basis review simply because they are in the immigration context." *Dent v. Sessions*, 900 F.3d 1075, 1081 (9th Cir. 2018) *cert. denied sub nom*. *Dent v. Barr*, 139 S. Ct. 1472 (2019). The Fifth Amendment—including its Equal Protection guarantee—"applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Plaintiffs' Equal Protection claim is subject to strict scrutiny, not rational basis review. *E.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689–90 (2017).

"The sensitive and fact-intensive inquiry needed to determine whether the [defendant] acted with discriminatory intent cannot be made solely on the pleadings." *Calderon v. Barbarino*, No. C 12-05819 JSW, 2013 WL 12176842, at *5 (N.D. Cal. May 2, 2013). Plaintiffs have alleged "sufficient specific facts to make their entitlement to relief at least plausible." *Faith Action for Cmty. Equity v. Hawaii*, No. CIV 13-00450 SOM, 2014 WL 1691622, at *11 (D. Haw. Apr. 28, 2014).

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CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

RESPECTFULLY SUBMITTED this 12th day of June, 2020.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 12th day of June 2020, at Seattle, Washington.

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